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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896

No. 100

THE UNITED STATES, APPELLANT

vs.

BUNNAM COAL COMPANY

A PETITION FOR A WRIT OF CERTIORARI

FILED MAY 6, 1896

(31125)

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1926

No. 100

THE UNITED STATES, APPELLANT

vs.

BURTON COAL COMPANY

APPEAL FROM THE COURT OF CLAIMS

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1 In Court of Claims of the United States

No. B-80

BURTON COAL COMPANY VS. THE UNITED STATES

I. History of proceedings

On April 26, 1922, the plaintiff filed its original petition.

On June 17, 1922, by leave of court, the plaintiff filed its amended petition.

Subsequently, to wit, on July 26, 1922, by leave of court, the plaintiff filed its second amended petition.

Said second amended petition is as follows:

II. Second amended petition. Filed July 26, 1922

To the Honorable Chief Justice and the Judges of the said Court:

The petitioner represents:

(1) That the petitioner is a corporation organized and existing under the statutes of the State of Illinois, having its principal office in Chicago, Illinois, and that it was incorporated as the Wickham and Burton Coal Company, and about April 1, 1921, its name was changed by amendment to its articles of incorporation under the statute of Illinois, to the present title.

(2) That in Chicago, Illinois, about September 10, 1920, petitioner entered into a certain contract in writing with one H. Barr, a first lieutenant of the Quartermaster Corps, United States of America, which contract was then and there duly signed by the parties; that said Barr acted for and on behalf of the United States of America under due and proper authorization by which he was invested with authority to make such contract, and more particularly under section 3732 of the Revised Statutes of the United States.

2 (3) That by said contract petitioner sold, and the United States purchased, one hundred and fifty thousand (150,000) tons of mine run bituminous coal at six dollars and seventy-five cents (\$6.75) per ton of two thousand (2,000) pounds, free on board cars at mines in Illinois, to be delivered at the rate of approximately sixty-one hundred (6,100) tons per week, under shipping directions to be issued by the depot quartermaster at Chicago, Illinois; that the total price of said coal was one million twelve thousand five hundred dollars (\$1,012,500). A full, true and complete copy of said contract is attached to the original petition on file herein; and made a part hereof, as though set forth in *haec verba*.

(4) That said petitioner gave bond in form and substance as required by said contract, which said bond was approved and accepted by the United States.

(5) That said contract did not specify therein the date of its expiration but that by its terms, especially in reference to the quantities and times of delivery which are stated in said contract approximately, said contract expired on, to wit, the first day of March, A. D. 1921, and that up to and including, to wit, the first day of March, A. D. 1921, both the parties to said contract treated it as remaining in full force and effect; that on, to wit, the 9th day of March, A. D. 1921, said contract was repudiated, renounced and abandoned by the United States by written notice under said date, as is hereinafter more fully set forth; that said petitioner made no response, oral or written, to said written notice of the 9th day of March, A. D. 1921, but remained silent and elected and now elects to sue under said contract for the purpose of recovering its damages for breach of contract by the United States.

3 (6) Prior to said first day of March, A. D. 1921, and prior to the said 9th day of March, A. D. 1921, petitioner delivered the full tonnage under said contract which was demanded by the United States, and for which it had received shipping instructions, and the full tonnage required under said contract would have been delivered by petitioner prior to the said first day of March, A. D. 1921, had shipping instructions for such tonnage been received by it from the United States.

(7) That said petitioner in every respect fully and completely performed said contract in so far as the United States permitted it so to do, and was able, ready and willing at all times to fully perform said contract and offered so to do.

Petitioner further says that during each of the months of December, 1920, and January and February, 1921, it asked and requested from the United States, through its depot quartermaster at Chicago, orally and by telephone, shipping directions for the coal remaining undelivered under said contract, but said United States, through its departments and agent or agents, refused or failed to give said shipping directions in answer to said oral and telephonic requests, although said requests were made as aforesaid weekly and sometimes daily during said months, and on February 9, 1921, petitioner wrote the United States, through its Quartermaster Corps, at the depot of the latter in Chicago, that petitioner was awaiting shipping instructions for the coal remaining undelivered under said contract, amounting to one hundred thousand (100,000) tons.

(8) That the United States on its part failed to perform in this:

4 That it did not give, but declined and failed to give to petitioner, shipping instructions although often requested so to do, as hereinabove set forth, for all of such coal, but gave directions to petitioner for the delivery of only fifty-three thousand one hundred forty-eight and seventy one-hundredths (53,148.70) tons, which said shipping instructions were as follows:

Said Lieutenant H. Barr, of the Quartermaster Corps, under authority of the acting quartermaster at Chicago, instructed Wickham and Burton Coal Company, the petitioner, in writing September 27, 1920, to load and bill ten (10) cars of coal per day to the quartermaster at Fort Snelling, and twenty (20) cars of coal per day to the quartermaster at Fort Sheridan, and that such billing should continue until further notice, and October 1, 1920, confirmed said instructions; October 27, 1920 (confirming telephone instructions), to ship to Scott Field, Belleville, Illinois, two thousand (2,000) tons of coal, to be applied on said contract; November 15, 1920, to discontinue shipments of coal to Fort Snelling, and furnish only thirty-three hundred (3300) tons to Fort Sheridan, and said instructions as to the shipment of thirty-three hundred (3300) tons only to Fort Sheridan were confirmed November 22, 1920, in writing, by Major Morris Stayton of the Quartermaster Corps, purchasing officer; that all other instructions concerning the billing and shipment of coal were given orally or by telephone to the petitioner by said Quartermaster Corps at Chicago.

(9) That said tonnage, amounting to, to wit, fifty-three thousand one hundred and forty-eight and seventy one-hundredths (53,148.70) tons of coal shipped by petitioner under said instructions as aforesaid, were shipped to the following Army posts or places in the following number of tons, respectively, to wit:

5	Fort Des Moines	2,050.35	tons.
	Sparta, Wisconsin	531.50	"
	Fort Sheridan	34,837.00	"
	Scott Field	2,087.95	"
	Rock Island, Illinois	625.45	"
	Federal Street, Chicago	212.05	"
	Hawthorne, Illinois	321.15	"
	Fort Snelling	12,483.05	"
	Total tonnage	53,148.70	"

(10) That the United States on its part delayed, discontinued, withheld, and failed to give billing and shipping instructions in reference to the remainder of said one hundred and fifty thousand (150,000) tons of coal contracted for, amounting to, to wit, ninety-six thousand eight hundred and fifty-one and thirty one-hundredths (96,851.30) tons, as aforesaid, and also in the manner and at the times following:

Major Morris Stayton, of the Quartermaster Corps, purchasing officer, informed the petitioner in writing, December 6, 1920 (confirming telephone conversation), that at that time there was no place where any of the undelivered coal which had been contracted for could be shipped, but it was hoped that it could be shipped prior to the date the contract expired; January 12, 1921 (confirming telephone conversation), that all shipments of coal to quartermaster, Des Moines, Iowa, should be discontinued until further notice; February 9, 1921, that all shipments of coal under said contract should be stopped until further notice from the office of said quartermaster.

(11) That petitioner promptly and fully complied with each and all the billing and shipping instructions of the United States, 6 and shipped the coal as directed; but because of the failure and refusal of the United States to give shipping directions for the remaining ninety-six thousand eight hundred and fifty-one and thirty one-hundredths (96,851.30) tons of coal, petitioner was unable to ship any part thereof.

(12) That the United States on its part also failed to perform in this, that at no time between September 10, 1920, and March 9, 1921, when it repudiated, renounced and abandoned said contract, did it at any time furnish any cars, or any car, for the transportation of coal to be delivered, and delivered by petitioner under said contract, but petitioner was compelled in order to comply with the shipping instructions of the United States, to, and did provide for and furnish cars by means of which, and in which the coal delivered under said contract was delivered, and the United States in this respect was at all times in default under said contract, and guilty of repeated breaches thereof and a continuing breach.

(13) That the United States Government, after September 10, 1920, the date it entered into said contract with petitioner, entered into a contract to, and did purchase from Emmons Coal Mining Company of Philadelphia, Pennsylvania, a total tonnage of one hundred seven thousand six hundred and twenty-six (107,626) tons of coal, which said coal was shipped to Camp Grant, Illinois, and Jefferson Barracks, St. Louis, Missouri, at a price of five dollars and fifty cents (\$5.50) per ton, free on board the mine, prior to March 1st, 1921.

(14) That the United States, through Captain C. A. Radcliffe, of Quartermaster Corps, at Chicago, on March 9, 1921, transmitted a letter to petitioner, enclosing therein a letter of cancellation 7 covering said coal undelivered under said contract, and stating that the coal undelivered approximated ninety-six thousand four hundred and thirty-six (96,436) tons; that said letter of cancellation bore date March 7, 1921, was signed by Captain C. A. Radcliffe, and stated that due to the limited appropriation for the purchase of coal and to the fact that no further calls would be made for delivery on said contract dated September 10, 1920, the undelivered portion (approximately ninety-six thousand eight hundred and fifty-one and thirty one-hundredths (96,851.30) tons of bituminous mine run coal at six dollars and seventy-five cents (\$6.75) per ton, was thereby cancelled; that except for the said letters of March 7, 1921, and March 9, 1921, petitioner never received any letter or notice, orally or in writing, cancelling or attempting to cancel, or giving notification of an intention to cancel said contract as of either of the dates mentioned, or as of any other date prior or subsequent thereto; and said petitioner alleges that the said letters dated March 7, 1921, and March 9, 1921, were wholly insufficient for any purpose whatsoever under said contract, and were of no legal effect whatever except

insofar as they evinced an intention to repudiate, renounce, and abandon said contract, and amounted to such a repudiation, renunciation and abandonment.

(15) That the market value of the coal specified in said contract declined after the month of August, 1920, when the parties hereto entered into negotiations for the sale and purchase of said coal, and after the date of the making of said contract in Illinois, and particularly in Chicago and at the places in Illinois at which the mines were located, from which coal was to be delivered f. o. b. to the United States under said contract.

8 That the said market value of mine run coal at the places aforesaid was: In December, 1920, about \$3.00 per ton; and in January and February, 1921, about \$2.00 per ton, but in each of said months said kind of coal actually sold at lower prices per ton.

That petitioner further says that on or about March 1st and March 9, 1921, as well as during said month of March, the market value of mine run coal, the coal specified in said contract at the places hereinabove mentioned was, to wit, \$2.00 per ton.

(16) By reason whereof petitioner says that it has sustained damage to the extent of four dollars and seventy-five cents (\$4.75) per ton on each ton of the tonnage of coal undelivered, amounting to ninety-six thousand eight hundred and fifty-one and thirty one-hundredths (96,851.30) tons of coal, aggregating, to wit, four hundred sixty thousand forty-three dollars and sixty-seven cents (\$460,043.67) and interest.

(17) Petitioner alleges further that it is the sole owner of the above claim; that no assignment or transfer of same or any part thereof has been made; that petitioner is justly entitled to the amount claimed from the United States after allowing all just credits and off-sets; that petitioner is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against the Government of the United States, and that it believes the facts as stated in this petition to be true.

(18) Petitioner avers that the damages claimed herein are the legal and proper measure of damages as fixed by Sec. 67 of the Uniform Sales Act adopted in Illinois by its General Assembly (Callaghan's Laws Ann. 1917-1920, Ch. 121) and by the fixed rule
9 established by the decision of the court of last resort of said

State of Illinois, and that petitioner is entitled to interest on the sum of money assessed by this court as damages, from the date fixed by this court for the assessment of damages up to the date of judgment, and that said interest should be assessed under the statute of the State of Illinois relating to interest, and in accordance with the fixed rule established by the decision of the court of last resort of the State of Illinois.

Wherefore, petitioner prays judgment for such sum of money as may be justly due and owing it, amounting to, to wit, four hundred and sixty thousand forty-three dollars and sixty-seven cents (\$460,-

043.67) and interest thereon, from to wit, the 9th day of March, A. D. 1921, and such further and other relief to which it may appear petitioner is entitled.

MACLAY HOYNE,

*Attorney for Petitioner, Burton Coal Company,
1205 Rector Building, 79 W. Monroe Street, Chicago, Illinois.*

[Duly sworn to by Fred A. Burton, jurat omitted in printing.]

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Exhibit to second amended petition

Contractor

QUARTERMASTER CORPS CONTRACT FOR SUPPLIES

Authorization
QM PJ 212001 PM 2006

No. of contract, GP 986-GS; appropriation, G. A., Q. M. C. F. Y., 1921; article, coal, bituminous, mine run; bond, \$105,000.00; total amount, \$1,012,500.00.

These articles of agreement entered into as of the tenth day of September, 1920, between H. Barr, 1st Lieut. Quartermaster Corps, United States Army, located at 1819 W. 39th St., Chicago, Ill. (herein called "contracting officer"), acting by authority of the Quartermaster General of the Army (herein called "Quartermaster General"), and under direction of the Secretary of War, for and in behalf of the United States of America (herein called "United States"), party of the first part, and Wickham & Burton Coal Co. (a corporation organized and existing under the laws of the State of Illinois), City of Chicago, Illinois; County of Cook, State of Illinois (herein called "contractor"), party of the second part.

Witness: That it is agreed by and between the parties as follows:

1. Definition: (a) The term "contracting officer," when used herein, shall mean the officer in whose name this contract was executed on behalf of the United States, his successor or successors, his or their duly authorized agent or agents, and anyone designated by the Quartermaster General to act as contracting officer.

(b) The term "Quartermaster General," when used herein, shall mean the Quartermaster General or Acting Quartermaster General of the Army as constituted at the particular time.

2. Subject of contract: The contractor shall furnish and deliver to the United States, and the United States shall accept and pay for, the articles of work described, and upon the terms and conditions set forth, in Schedule "A," attached hereto and by reference made a part hereof. The articles or work in the absence

11 of more specific provisions, shall be of the best quality of materials and workmanship and free from defects. The unit price specified in Schedule "A" shall be paid at the office of the disbursing

officer designated herein to make payments, for each article or unit of work accepted and as soon after acceptance as may be practicable.

3. Component parts and materials furnished by United States:
(a) The United States shall furnish to the contractor, f. o. b. cars at or near the contractor's plant (the contractor, however, to pay all demurrage and switching charges), the component parts and materials, if any, listed in the attached Schedule "A," at such times and in such quantities as in the opinion of the contracting officer will enable the contractor to perform this contract in accordance with its terms. The United States shall reimburse the contractor for any loss, damage, or additional expense sustained or incurred by the contractor as a direct and necessary result of the failure of the United States so to furnish such component parts and materials, which amount shall be determined by agreement between the contractor and the contracting officer, and in the event of their failure to agree, shall be determined in the manner and with the effect provided in the article hereof entitled "Adjustment of Claims and Disputes."

(b) The United States may, at its option, furnish to the contractor any or all of the component parts and materials for the performance of this contract at any time before the contractor, in good faith, shall have made commitments for the same, and the United States may thereupon deduct from any payments due to the contractor hereunder the cost to the United States of such component parts and materials, including the cost of delivery, f. o. b. cars at or near the contractor's plant, such deduction, however, not to exceed the amount for which the contractor might have acquired the same.

(c) Any component parts and materials furnished by the United States under the above subdivisions (a) and (b) shall comply 12 with the requirements of this contract and shall at all times remain the property of the United States, unless paid for by the contractor as above provided. The contractor shall use and be responsible to the United States for due and proper care in using, protecting, handling, and storing component parts and materials so belonging to the United States, and, except to the extent that the contract may provide that such component parts and materials shall become the property of the contractor, shall account to the United States for the same, either in finished product, scrap, unused component parts and materials, or otherwise, and shall make such disposition thereof, for the account of the United States, as the contracting officer may direct in writing.

(d) If this contract does not specifically provide that unused component parts or materials shall become the property of the contractor, or if a different disposition of the same has not been directed by the contracting officer, such unused component parts or materials, or waste therefrom, shall be properly packed, boxed, or baled, and delivered at the expense of the contractor at the point where the finished product contracted for is required to be delivered.

(e) Any containers such as burlap, metal or wood cases, and the like, in which is transmitted to any contractor any component parts or materials furnished by the United States, shall remain the property of the United States and be delivered by the contractor to such representative of the United States as the contracting officer may direct.

4. Packing, boxing, and marking: The articles or work shall be packed, boxed, and marked by the contractor in the manner provided in the attached Schedule "A," or, in the absence of specific provisions therein, in accordance with the directions of the contracting officer.

5. Changes in drawings and specifications: Changes in the drawings and specifications forming a part of this contract may be made from time to time by the contracting officer by giving written notice of such changes to the contractor. The contract price or compensation of any articles or work manufactured or performed in accordance with such changed drawings and specifications shall be modified to conform to any increase or decrease in the cost of manufacture or performance due to such changes. The contractor's time for performance of this contract shall be extended to cover any delay in performance caused to the contractor by such changes. The amount of such increase or decrease in price or compensation, as well as of any extension of time for performance, shall be determined by agreement between the contractor and the contracting officer, and in the event of failure to agree shall be determined in the manner and with the effect provided in the article hereof, entitled "Adjustment of claims and disputes."

6. Inspection: The articles or work are subject to observation, inspection, and tests by the United States at any and all times during manufacture or performance, in order to determine their compliance with the requirements of this contract, and are subject to acceptance or rejection by the United States at the place designated in Schedule "A." For these purposes the United States may maintain an inspector or inspectors at the plants or places where and during the time this contract is being performed. Such inspectors may reject any and all articles or work, or components thereof, and materials found not to be in compliance with the requirements of this contract. No preliminary test or acceptance shall preclude the United States from rejecting any articles or work upon final inspection or test at completion. The contractor shall furnish all reasonable facilities and assistance requested by such inspectors for the performance of their duties. Inspections and tests by the United States shall be carried out in such a manner as not unduly to delay the performance of this contract by the contractor. Nothing contained in this article shall limit or annul any inspection or test which may be called for by the drawings and specifications forming a part of this contract. No inspection, acceptance, or payment under this contract shall deprive the United States of any claim against the contractor hereunder by

reason of fraud or deception, or by reason of latently defective articles, materials, or workmanship.

14 7. Storage: The contractor agrees to provide, at its expense, storage facilities at or near its plant sufficient for the storage of a reasonable number of days' production of the articles or work at the maximum rate of deliveries or performance herein provided, and to utilize such storage facilities during the life of this contract for the storage of any accepted articles or work which the contracting officer may require be stored therein. Any such articles or work shall be adequately and safely stored by the contractor at the contractor's expense. The contract price or compensation of accepted articles or work so stored shall be paid by the United States upon the storage of such articles or work, but neither such storage nor such payment shall relieve the contractor of its obligation to bear the expense of ultimately delivering such articles or work in the manner and at the place or places specified in this contract. In case any such articles or work are not so delivered, the contractor shall refund to the United States any sums paid by the United States with respect thereto which the contractor is not entitled to retain under the provision of this contract.

8. Delays due to causes beyond contractor's control: The contractor shall not be held responsible for, or be deemed to be in default hereunder by reason of, delays in the performance of this contract caused by strikes, fires, explosions, riots, acts of God, failures of transportation, or other causes beyond the control and without the fault of the contractor, including delays caused to the contractor by the direct act or failure to act of the United States, and the contractor's time for performance of this contract shall be hereby extended to cover the delay in performance so caused to the contractor: Provided, That the contractor shall have immediately and fully notified the contracting officer of any such cause of delay and shall have used its best efforts promptly to remove the same and to obviate the effects thereof: And provided further, That such delay shall not have been due to the contractor's failure to comply with any of the provisions of this contract. The contractor shall proceed with the performance of this contract as soon as and to the extent that any such because of delay shall have been removed. The United States, however, shall have the right, by giving written notice to the contractor, to relieve itself in whole or in part from the obligation to accept the delivery or performance of the articles or work which has been so delayed, in which event the United States shall make payments to and protect the contractor (with respect to the articles or work as to which the United States shall have relieved itself of the obligation to accept delivery or performance) in the same manner as provided in section 2 of the article hereof entitled "Cancellation and termination before completion."

9. Cancellation and termination before completion: SECTION 1. Cancellation for Contractor's Default. In the event of the con-

tractor's default in making deliveries at the times and in the quantities herein specified, or in performing the work at the times and in the manner herein provided, the contracting officer may at any time and from time to time, at his option, by giving written notice to the contractor, cancel on behalf of the United States the delivery or performance of all or any part of the articles or work then in arrears, and such cancellation shall be deemed to be effective from date as may be specified in said notice.

Articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date any cancellation above permitted is to become effective shall be accepted, and upon delivery shall be paid for by the United States at the contract price or compensation. Any such cancellation shall be without prejudice to any other rights or remedies or to any claim against the contractor which the United States may have by reason of such default or otherwise.

SECTION 2. Termination of public interest. If, in the opinion of the Quartermaster General, the public interest shall so require, this contract may be terminated by the United States by 15 days' notice in writing from the contracting officer to the contractor, and such termination shall be deemed to be effective upon the expiration of

15 days after the giving of such notice, and shall be without
16 prejudice to any claims which the United States may have
against the contractor under this contract. After the receipt
of such notice the contractor shall not order any further materials
or facilities, or enter into any further subcontracts, or make any
further purchases in connection with the performance of this con-
tract, without written consent previously obtained from the
contracting officer, but inspection of the completed articles or work and
acceptance thereof by the United States in accordance with the terms
of this contract shall continue during such period of 15 days as
though such notice had not been given.

In the event of and upon such termination of this contract prior to completion, as provided in this section 2, for any reason other than the default of the contractor, the United States shall make payments to and protect the contractor as follows:

(a) The United States shall pay to the contractor the contract price or compensation, not previously paid, for all articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date such termination becomes effective.

(b) The United States shall reimburse the contractor for such proportion of the contractor's expenditures (other than expendi-
tures for plant, facilities, and equipment solely provided for the
performance of this contract) made by the contractor in good faith
in connection with the performance of this contract, as is fairly and
properly apportionable to the articles or work the delivery or per-
formance of which is so terminated, plus 10 per cent of the amount
so ascertained. Any raw materials, articles in process of manufac-

ture, and other property so paid for shall become the property of the United States.

(c) The United States shall protect the contractor against such proportion of the contractor's outstanding obligations, incurred by the contractor in good faith in connection with the performance of this contract, as is properly and fairly apportionable to the articles or work, the delivery or performance of which is so terminated.

17 The facts to be determined under the above subdivisions (b) and (c) shall be determined by agreement between the contractor and the contracting officer, and in event of their failure to agree shall be determined by three persons, one to be appointed by the contractor, one by the contracting officer, and the third by these two.

(d) The United States shall also pay to the contractor on account of depreciation or amortization of plant, facilities, and equipment, solely provided by the contractor at its expense for the performance of this contract, an amount to be determined as follows: As soon as conveniently may be done after such termination of this contract, the fair market value of such plant, facilities, and equipment at the time of such termination shall be determined by an appraisement to be made by three appraisers, one to be appointed by the contractor, one by the contracting officer, and the third by these two. The United States shall then pay to the contractor such part of the amount by which the cost to the contractor of such plant, facilities, and equipment shall exceed such appraised fair market value thereof as shall be fairly and properly apportionable to the articles or work the delivery or performance of which is so terminated; and in determining regard shall be had to the extent to which this contract shall have been performed and the extent to which the cost of said plant, facilities, and equipment should be regarded as having been absorbed by such performance. The amount so fairly and properly apportionable shall be determined by agreement between the contractor and the contracting officer, if possible, and in the event of their failure to agree shall be determined by three persons, one to be appointed by the contractor, one by the contracting officer, and the third by these two.

In the event of the termination of this contract under this section 2, any and all obligations of the United States to make any payments to the contractor under this contract, other than those specified or provided for in this section 2, and in the article hereof entitled

"Patent Infringements," shall at once cease and determine.

18 SECTION 3. Assignment of subcontracts. In the event of the cancellation or termination of this contract, pursuant to the provisions of the above section 1 or 2, the contractor shall, upon the request of the contracting officer, assign to the United States, or to such person as the contracting officer may direct, the unperformed portion of any or all contracts and subcontracts made by the contractor in contemplation of or in connection with the performance of this contract. In the event of the failure of the contractor to

assign any such contract or subcontract as herein provided, this contract shall operate as such assignment. It is understood that such assignment in and of itself shall not compel the United States to assume or become responsible for any obligation of the contractor which has arisen prior to such assignment by reason of the contractor's performance of, or failure to perform, the contract or subcontract so assigned.

SECTION 4. Taking possession of contractor's plant. In the event of the cancellation or termination of this contract, pursuant to the provisions of the above section *Section 1 or 2*, the United States may proceed at the contractor's plant to complete the manufacture or performance of the articles or work herein contracted for, or any part thereof, as well as to manufacture additional articles or perform additional work out of materials and property then on hand for the performance of this contract, and for these purposes may take possession of and use any or all of the plants and properties of the contractor used in the performance of this contract.

If the United States shall take possession of and use any of the plants and properties of the contractor as above permitted, the United States shall pay to the contractor such reasonable sum for the use thereof as may be agreed upon between the contracting officer and the contractor, or if they fail to agree, as may be determined in the manner and with the effect provided in the article hereof entitled "Adjustment of Claims and Disputes." Such plants and properties shall be occupied and used by the United States without cost or expense to the contractor; the United States, however, reserving any claim which it may have against the contractor under this contract.

10. Encumbrances: The contractor agrees not to create or suffer to be created any lien or encumbrance against the articles or work or against any property entering into their manufacture or performance, and in the event any such lien or encumbrance is created, the contractor agrees promptly to pay and discharge the same or to furnish proper bond or security to have the same released, to the end that the articles or work may become the property of the United States free and unencumbered. In case the contractor shall fail to pay and discharge any such lien or encumbrance or to furnish proper bond or security to have the same released, the United States may do so at the contractor's expense and may deduct from any payments due to the contractor hereunder the amount of any expense so incurred by the United States.

11. Plant protection: The contractor shall take all reasonable precautions for the protection of the plant and property to be used in the performance of this contract, and the work in progress hereunder, against espionage, fire, explosion, acts of war, and acts of enemy aliens, and shall provide such additional watchmen and devices, and adopt such particular measures for the protection of such plant, property, and work as the contracting officer shall from time to time direct. The contractor shall, when required, report to the

contracting officer the citizenship, country of birth, or alien status of any or all of its employees. When required by the contracting officer, the contractor shall refuse to employ, or, if already employed, shall forthwith discharge from employment and exclude from its plants any person or persons designated by the contracting officer, for cause, as undesirable for employment in a plant engaged on work for the United States. Failure to comply with any or all of the provisions of this article shall render the contractor responsible for all loss or damage to the United States arising from any of the hazards herein sought to be guarded against and shall also be cause for the cancellation of this contract. The United States shall pay to
20 the contractor as an addition to the contract price or compensation, or as part of the cost of the articles or work herein contracted for, any additional expense incurred by the contractor, which, in the opinion of the contracting officer, is an additional expense created by the enforcement of this article and resulting from action taken by the contractor beyond or in addition to said above-mentioned reasonable precautions.

12. Contract not transferable: Neither this contract, nor any interest herein, shall be transferred by the contractor to any other party, except to the extent permitted by section 3477, United States Revised Statutes.

13. Subcontracts: No contract shall be made by the contractor with any other person for furnishing any of the completed or substantially completed articles or work herein contractor for, without the written approval of the contracting officer. Every contract and subcontract made by the contractor in contemplation of or in connection with the performance of this contract shall state that it relates to this contract and shall contain a provision that its unperformed portion may be assigned at any time by the contractor to the United States, or its nominee.

14. Officials not to benefit: No Member of or Delegate to Congress, or Resident Commissioner, is or shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this article shall not apply to this contract so far as it may be within the operation or exceptions of section 116 of the act of Congress approved March 4, 1909. (35 Stats. 1109.)

15. Covenant against contingent fees: The contractor expressly warrants that it has employed no third person to solicit or obtain this contract in its behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that it has not paid, or promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commission, or percentage upon the amount receivable by it
21 hereunder; and that it has not, in estimating the contract price or compensation demanded by it, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to it hereunder are free from obligation to any other

person for services rendered, or supposed to have been rendered, in the procurement of this contract. The contractor further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the United States and that the United States may retain to its own use from any sums due or to become due hereunder an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid.

If this contract covers products of the cotton, woolen and worsted, silk textile or hardware industry, the above warranty and agreement shall be subject to the exception that they shall not be construed to apply to a contractor who handled his products through a selling agency or agencies which have handled such character of products prior to and since April 1, 1917.

Provided, however, it is understood that this covenant does not apply to the selling of goods through a bona fide commercial representative employed by the contractor in the regular course of his business in dealing with customers other than the Government and whose compensation is paid, in whole or in part, by commissions on sales made, nor to the selling of goods through established commercial or selling agents or agencies regularly engaged in selling such goods.

16. Patent Infringements: The contractor agrees to hold and save the United States and its representatives harmless against all liability and damage arising by reason of the infringement or alleged infringement of letters patent of the United States relating to the articles or work herein contracted for which are owned or controlled, either by assignment, license, or otherwise, by the contractor, its officers or employees, or persons in privity with the contractor, and by reason of the infringement or alleged infringement of letters

22 patent of the United States which cover or relate to any materials, apparatus, or processes of manufacture not specifically prescribed by the United States for the performance of this contract.

The United States agrees to hold and save the contractor and its representatives harmless against all liability and damage arising by reason of the infringement or alleged infringement of letters patent of the United States relating to the articles or work herein contracted for which are not owned or controlled either by assignment, license, or otherwise, by the contractor, its officers or employees, or persons in privity with the contractor, and which cover materials, apparatus, or processes of manufacture specifically prescribed by the United States for the performance of this contract: Provided, immediate notice of any claim of infringement or of any legal proceedings in connection therewith is given in writing by the contractor to the Quartermaster General: And provided further, That the United States is permitted to intervene in any such claim or proceeding and in its discretion to defend the same or to make settlement thereof, in which events the contractor shall furnish all information and assistance requested by the United States.

17. Adjustment of claims and disputes: Except as otherwise specifically provided in this contract, any claims, doubts, or disputes which may arise under this contract, or as to its performance or nonperformance, and which are not disposed of by mutual agreement, may be determined, upon petition of the contractor, by the Secretary of War or his duly authorized representative or representatives. If the Secretary of War selects a board as his authorized representative to hear and determine any such claims, doubts, or disputes, the decision of the majority of said board shall be deemed to be the decision of the board. The decision of the Secretary of War or of such duly authorized representative or representatives shall be final and conclusive on all matters submitted for determination: Provided, That where the decision is rendered by such representative or representatives, the Secretary of War may, at his option, either upon his own motion or upon petition filed with him by the contractor within 20 days after notice of the decision of such duly authorized representative or representatives has been served upon him, review the action of such representative or representatives and render his decision thereon. Any sum or sums allowed to the contractor under the provisions of this article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

18. Eight-hour basic day, time and one-half for overtime: Wages of laborers, operatives, and mechanics doing any part of the work contemplated by this contract, in the employ of the contractor, shall be computed upon a basic day rate of eight hours work, with overtime rates to be paid for at not less than time and one-half for all hours in excess of eight hours. Compliance by the contractor with the provisions of this article shall be of the essence of the contract.

(Note: Article 18 may be omitted where not required by law. See act of June 19, 1912 (37 Stat. 137), act of March 4, 1917 (39 Stat. 1168) 1192, and Executive order of March 24, 1917.)

19. Adjustment of labor disputes: In the event that labor disputes shall arise directly affecting the performance of this contract and causing or likely to cause any delay in making the deliveries, and the Secretary of War or his representative shall have requested the contractor to submit such disputes for settlement, the contractor shall have the right to submit such disputes to the Secretary of War for settlement. The Secretary of War may thereupon settle or cause to be settled such disputes, and the parties hereto agree to accede to and to comply with all the terms of such settlement.

If the contractor is thereby required to pay labor costs higher than those prevailing in the performance of this contract immediately prior to such settlement, the Secretary of War or such representative in making such settlement and as a part thereof may direct that a fair and just addition to the contract price shall be made therefor: Provided, however, That the Secretary of War or his representa-

24 tive shall certify that the contractor has in all respects lived up to the terms and conditions of the contract or shall waive in writing for this purpose only any breach that may have occurred.

If such settlement reduces such labor cost to the contractor, the Secretary of War or his representative may direct that a fair and just deduction be made from the contract price.

No claim for addition shall be made unless the increase was ordered in writing by the Secretary of War or his duly authorized representative and such addition to the contract price was directed as part of the settlement.

Every decision or determination made under this article by the Secretary of War or his duly authorized representative shall be final and binding upon the parties hereto.

20. Laws and restrictions relative to labor: All work required in carrying out this contract shall be performed in full compliance with the laws of the State, Territory, or District of Columbia, where such labor is performed: Provided, That the contractor shall not employ in the performance of this contract any minor under the age of 14 years or permit any minor between the age of 14 and 16 years to work more than eight hours in any one day, more than six days in any one week, or before six a. m. or after seven p. m. Nor shall the contractor, directly or indirectly, employ any person undergoing sentence of imprisonment at hard labor which may have been imposed by a court of any State, Territory, or municipality having criminal jurisdiction: Provided, however, That the President of the United States may by Executive order modify this provision with respect to the employment of convict labor and provide the terms and conditions upon which such labor may be employed. These provisions shall be of the essence of the contract.

21. General provisions: (a) The contractor shall from time to time, and whenever so requested, furnish to the Quartermaster General or to such person as the Quartermaster General may designate statements and reports on the progress of the performance of this contract and full information on all factors relating to deliveries or performance hereunder. Representatives of the United States shall have the privilege of visiting all offices and plants of the contractor for the purpose of ascertaining the progress of the performance of this contract under regulations prescribed by the Quartermaster General.

(b) Any notice to the contractor under this contract, when not actually delivered in writing to the contractor, shall be deemed to have been sufficiently given when mailed in a sealed, postpaid wrapper addressed to the contractor at the address above set forth. Any notice to the United States under this contract, when not actually delivered in writing to the Quartermaster General, shall be deemed to have been sufficiently given when mailed in a sealed, postpaid wrapper addressed to the Quartermaster General, War Department, Washington, D. C.

22. Waiver: No provision of this contract shall be deemed waived without express consent in writing signed by the party charged with the waiver.

23. Bond: Unless bond is waived in Schedule "A" the contractor shall forthwith furnish to the United States a bond with the contractor as principal and such surety as shall be approved by the contracting officer as surety thereon, in the penal sum specified in Schedule "A," conditioned upon the faithful and complete observance and performance of this contract by the contractor and satisfactory in form to the contracting officer.

24. Appropriations: This contract shall be noneffective until an appropriation adequate to its fulfillment is granted by Congress and is available, except in so far as is necessary to provide for the necessities of the service as authorized by section 3732 of the Revised Statutes of the United States. However, in order to provide for the necessities of the service as authorized by said section 3732, the articles so far as authorized by said section shall be furnished and delivered at the times and in the manner required under this contract, and payments therefor shall be made as soon as practicable after funds are appropriated and are available.

25. Changes made before signature: The following changes
26 designated by articles and lines were made in this contract
before it was signed by the parties hereto, to wit:

In preamble, page one, the words "a partnership consisting of," deleted. To article 15 on page three a seventy-six word proviso clause added. Pages 5 and 6, being Schedule "A," on Q. M. C. form 106-D is added and made a part of contract.

On page four the words "on proposals received in response to the advertisement hereto attached, which was published in newspapers and posted in public places for ---- days prior to the opening, and was sent to the principal dealers and contractors at ----- and vicinity" deleted and the words "on open market purchase per A.R. 551 of 1913 sub. par. 3" added.

In witness whereof the parties aforesaid executed and delivered this contract in triplicate as of the date first hereinbefore written, and the contracting officer hereby certifies that if the contractor is a corporation, the said officer has satisfied himself of the authority of the person signing the contractor's name to bind the contractor and has waived the filing of written evidence of said authority.

Witness:

H. BARR,

1st Lieut., Purchasing & Contracting Officer.

WICKHAM & BURTON CO.,

By L. A. MACDONALD,

Vice President.

Approved: Board of Review

By-----

Following affidavit is required only on the copy for returns office:
 I do solemnly swear that the foregoing is an exact copy of a contract made by me personally with the contractor named above; that I made the same fairly, without any benefit or advantage to myself,
 or allowing any such benefit or advantage corruptly to the con-
 tract or any other person; and that the papers accompany-
 ing include all those relating to the contract, as required by
 the statute in such case made and provided.

H. BARR,

1st Lieut., Purchasing & Contracting Officer.

Subscribed and sworn to before me this ----- day of
 -----, 19----

The following certificate is required only on the number marked "Auditor for the War Department."

I certify that the award of the foregoing contract was made to the lowest responsible bidder for the best and most suitable articles or services on open market purchase, par. A. R. 551 of 1913, sub. par. 3.

H. BARR,

1st Lieut., Purchasing & Contracting Officer.

(Strike out any portion of this form of certificate that would not be in accordance with the facts. If award was not made to the lowest bidder, a full explanation must be submitted. A copy of the advertisement must be attached in the case of all purchases made after public notice of seven days or more.)

The following certificate is required where bond is waived on the number marked "O. Q. M. G."

I certify that I have made a thorough investigation of the financial standing, liabilities, and reputation of the contractor named in the foregoing contract and that I am satisfied that the contractor will faithfully and diligently comply with all the terms of the contract.

H. BARR,

1st Lieut., Purchasing & Contracting Officer.

NOTES

1. The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or a corporation, should be inserted in and signed to the contract in exactly the same form. An officer of a corporation, a partner, or an agent, 28 signing for the principal should add his name and title after the word "By" under the name of the principal. If the contractor is not a corporation or partnership, respectively, strike out the printed part "(a corporation organized and existing under the laws of the State of -----)" or "(a partnership consisting of -----)" on page 1.

2. F. O. B. point of delivery should be definitely stated, i. e., mill delivery exit; cars alongside of mill; cars freight yard or station at _____; Quartermaster warehouse at _____; cars or _____ dock at _____, etc.

3. Three copies of the contract and one additional copy of Schedule "A" must be sent before execution to the Contracts Advisory Branch, Office of the Quartermaster General, Washington, for approval by the Board of Review, unless telegraphic approval is obtained.

4. When interlineations, erasures, or other changes are made, notation thereof should be specifically made before the contract is sent for approval by the Board of Review, and no interlineations, erasures, or other changes shall be made under any circumstances after approval by the Board of Review.

SCHEDULE A

1. Contract date, September 10, 1920.
2. From Quartermaster at General Supply Depot, 1819 W. 39th St., Chicago, Ill., H. Barr, 1st Lieut. Q. M. C., Purchasing & Contracting Officer.
3. To—Name, Wickham & Burton Coal Co.; address, McCormick Building, Chicago, Ill.; mines at White Ash, Freeman, and Paradise, Ill.
4. Deliver the following articles: Coal bituminous, mine run.
5. Total quantity, 150,000 tons.
6. Unit price, \$6.75 per ton of 2,000 tons.
7. Total price, \$1,012,500.00.
8. F. O. B. delivery point, 40,000 tons, White Ash, Ill., C. &
- 29 E. I. R. R.; 50,000 tons, Paradise, Ill., Ill. Central R. R.;
60,000 tons, Freeman, Ill., Ill. Cent. & C. B. & Q. R. R.
9. Schedule of deliveries, approximately 1,600 tons per week from White Ash, Ill.; approximately 2,000 tons per week from Paradise, Ill.; approximately 2,500 tons per week from Freeman, Ill.
10. Shipping directions, to be issued by the Depot Quartermaster, 1819 W. 39th St., Chicago, Ill.
11. Authorization No., approved prior to signature, QM PJ 212001 PM 2006 September 9, 1920; A. S. Morgan, Colonel, Finance Department, Zone Finance Officer. GM.
12. Contract No. GP-986-GS.
13. Item No. of Appropriation 1205 104 G. A. Q. M. C. F. Y. 1921.
14. Bond, \$105,000.00.
15. Terms and specifications: Strict construction of time periods in contracts—the Secretary of War has directed that special attention of all contractors at the time of signing contracts, be called to the fact that it is the purpose of the War Department to exact a fulfillment of all contracts as to the time periods, and that they should understand when entering into contracts with this department that they need not to do so with the expectation that they can be relieved from these conditions.

It is provided that the Government may purchase coal other than herein contracted for, for test purposes, it being understood that the total of such coal so purchased for test purposes shall not exceed ten per cent of the total consumption estimated for during the term of this contract.

Demurrage accruing on coal, not rejected, accumulated at destination through the failure of the carrier to make deliveries to conform with the rate of shipments as directed by the supply officer on account of the inability of the receiving officer to unload same promptly at destination shall not be charged against the contractor.

If, during the term of the contract, the troops or garrison be withdrawn, in whole or in part, from the post or station, or other 30 radical change in the service, by which the coal will not be required, the contract will be modified accordingly.

During any period within which the contractor is unable to furnish coal from the mine or mines named herein in sufficient quantities to meet the needs of the Government, or in any quantity, because of strikes, interruption to transportation, shortage of railroad or water transportation equipment, or any other condition general in its nature for which the contractor is in no way responsible, the contractor shall not be held responsible for failure to furnish said coal, but in such case the contractor shall have the right to furnish coal from any other mine or mines producing coal acceptable to the Government under the contract. In case of said failure, or inability to furnish other coal, the Government shall have the right to procure any additional coal that may be required, and at no cost to the contractor, until it has been determined by the Government that the contractor is again able to furnish coal in amount as required. It must be understood, however, that the contractor will be relieved of the responsibility of furnishing coal under the contract only during the continuance of suspension of operation, from the said causes, at the mine or mines named in his bid, that he may not be relieved from furnishing any of the coal required under that contract for any of the foregoing causes or conditions, unless he shall have given the Government immediate notice, by wire, of the suspension of operations from causes beyond his control which prevent his furnishing coal in accordance with orders received under this contract. In all cases of disagreement between a contractor and the purchase division, the matter in controversy shall be referred to the Secretary of War, whose decision shall be final and binding on both parties to the contract.

On each day when a shipment is made, notice of the shipment must be supplied promptly to the supply officer located at the Army post, camp, or station, to which the coal is consigned, giving the following information:

- a. Date of shipment.
- b. Name of mine.
- c. Car initial and number.

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31 d. Type of equipment, i. e., hopper, flat bottom, gondola or box car.

e. Railroad weight of contents of car, or marked capacity of car. Also a weekly report showing above information must be mailed under sealed cover, postage prepaid, to the Depot Quartermaster, Purchase Division, 1819 W. 39th St., Chicago, Ill. The weekly report must be mailed whether shipments have been made or not. Failure to furnish promptly such notice of shipments and the weekly report will result in delay in passing vouchers for payment.

All coal shipped under these specifications must be reasonably clean and practically free of slate, dirt, and other impurities, and be what is generally accepted as a standard commercial grade of coal for the district from which shipped.

The authorized receiving officer shall, upon the arrival of the coal at the Army post, camp, or station, inspect the same, and if such inspection indicates that the coal is of inferior quality, or has not received careful and thorough preparation, same may be rejected, and the Government shall not be responsible for any acceptance by the authorized receiving officer, and the contractor shall be immediately notified by wire, and be required to remove the coal, without cost to the Government. Should the contractor not remove the rejected coal promptly, the Government reserves the right to have the coal removed, and charge any and all costs incidental to such removal against the contractor and his sureties, or deduct the cost thereof from any moneys, or thereafter to become due to the contractor.

Provisions of this contract depend upon the Government furnishing cars at mines indicated above. Bills in triplicate, quoting Wickham & Burton Coal Co. contract No. GP-986-GS dated September 10, 1920, QM PJ 212001 PM 2006 certified to by the vendor as to correctness to be rendered to the Finance Officer, U. S. Army, 1819 W. 39th St., Chicago, Ill., whose disbursing officer is designated to make payments on vouchers due under contract.

32 . *III. History of proceedings*

On August 28, 1922, the defendant filed a demurrer to the plaintiff's second amended petition.

On October 17, 1922, the demurrer was argued and submitted by Mr. Fred K. Dyar, for the defendant, and by Mr. Maclay Hoyne, for the plaintiff, and it was thereupon ordered that the said demurrer be overruled without prejudice.

On February 12, 1924, this case was argued and submitted on merits by Mr. Maclay Hoyne, for the plaintiff, and by Mr. Fred K. Dyar, for the defendant.

On March 31, 1924, the court filed findings of fact and conclusion of law dismissing petition and entered a judgment against the plaintiff in the sum of \$194.51, the cost of printing the record in this court, with an opinion by Booth, J.

On May 5, 1924, the plaintiff filed a motion for a new trial.

On May 26, 1924, the court entered the following order:

ORDER

The court having considered the plaintiff's motion for a new trial, allows the same.

The findings of fact, conclusion of law, and opinion filed herein March 31, 1924, are vacated and withdrawn.

The case is ordered placed upon the October calendar for argument.

IV. Argument and submission

(Oct. 21, 1924, omitted in printing.)

33 V. Findings of fact, conclusion of law, and Opinion of the Court by Booth, J., February 2, 1925

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact

I

The plaintiff is a corporation organized and existing under the laws of the State of Illinois, with its principal office in the city of Chicago. It was organized under the name of Wickham & Burton Coal Company, which name at some time subsequent to September 10, 1920, was, by amendment of its articles of incorporation, changed to Burton Coal Company.

II

On account of the rejection by the Quartermaster General's office of bids for the furnishing of coal to the War Department for the fiscal year 1920-21, as being at excessive prices, no provision had been made up to August, 1920, for coal for Army posts or stations in the Chicago district for that year. In this emergency and as a result of interviews and negotiations between Lieutenant Colonel Barney, of the Quartermaster General's office, Washington, D. C., and Lieut. Herbert Barr, assistant purchasing officer of the quartermaster supply office at Chicago, representing the Government, and Fred A. Burton, and L. A. MacDonald, president and vice president, respectively, of plaintiff company, a contract was entered into under date of September 10, 1920, between plaintiff and the United States, the latter acting through the said Lieutenant Barr as its contracting officer, for the purchase from plaintiff by the Government of 150,000 tons of bituminous coal, at \$6.75 per ton f. o. b. cars at designated mines in southern Illinois. The contract was drafted by the officers or agents of the United States. A copy of said contract is annexed to plaintiff's petition and is by reference made a part of this finding.

III

During the negotiations resulting in the execution of the said contract plaintiff's said officers informed Colonel Barney and Lieutenant Barr that they did not particularly care for Government business, on account of there being too much "red tape" about it, and the Government's not paying its bills promptly. They were then assured by Colonel Barney that if they entered into a
34 contract to furnish this coal to the Government he would see that the Government "took coal and paid for it promptly."

On August 5, 1920, an oral understanding was arrived at between plaintiff's said officers and Colonel Barney and Lieutenant Barr as to certain terms for the furnishing of 150,000 tons of coal by the plaintiff; and pursuant to a request of said Government officers for a confirmation by plaintiff of said understanding, plaintiff, on the following day, August 6th, wrote Lieutenant Barr as follows:

Lieutenant HERBERT BARR,

*Contracting Purchasing Officer,
Zone Supply Office, W. 35th St., Chicago, Ill.*

DEAR SIR: Confirming conversation of the 5th inst., we offer to enter into a contract with the War Department (or other governmental agency) to supply for shipment to Camps Grant, Custer and Ft. Sheridan, 150,000 tons of Williamson and Perry County (Illinois) coal under the following conditions:

(1) Coal will be produced at the White Ash mine of the Johnson City Washed Coal Co., at the Paradise mine of the Forester Coal & Coke Co., and at the Freeman mine of the Freeman Coal Mining Co.

(2) We may find it necessary to make some shipment from other neighboring mines and the formal contract should so provide. Any such shipments would be made under a provision that such coal is substantially of the same quality and value as the coal produced at the specified mines.

(3) The department (or other governmental agency) is to supply the cars, and this is to be done in such a way that such cars will not be counted against the producer in the distribution of coal-car equipment. In other words, such equipment so supplied is to be in addition to the equipment supplied by carriers in ordinary course.

This condition is fundamental, and if at any time the purchaser is unable to comply with this condition we are not to be held liable for nondelivery.

(4) Delivery is to be made in substantially equal weekly quantities from August 15, 1920, to February 15, 1921. But we are not obliged to make any delivery unless and until cars are furnished as above stated and only so long as they are furnished.

(5) The cars are to be furnished so that delivery can be made as above specified. If the full quota of cars are not furnished during any one or more weeks, then we shall not be bound to make up the

deficiency during subsequent weeks. But we shall do so if we can do so without loss. We are to specify the days of each week for the loading of this coal. If for any reason cars are not furnished on the days we specify, then we are not obligated to make delivery on any other day. But we will do so if we can without loss.

(6) The price is to be six dollars and fifty cents (\$6.50) per ton of 2,000 pounds f. o. b. mines, which is the place of delivery. Mine weights govern settlements.

(7) Payment is to be made each week or two on presentation of bills of lading, which are to be taken as evidence of delivery to carrier. We are not to be held for delays in transportation.

In case purchaser fails to make prompt payment as above provided, then we reserve the right to suspend shipment during such time.

35 (8) The contract should contain the usual clause releasing us from delivery in whole or in part in case the specified mines, or either thereof, are prevented from producing coal by strikes, labor difficulty, or any cause beyond producer's control. After the removal of such difficulty shipments will be resumed, but we will not be obliged to make up the deficiency caused by the shutdown.

(9) The price named is based on the present scale of wages paid to mine employees. In case of any change in the wage scale the price is to be changed accordingly.

Yours very truly,

WICKHAM & BURTON COAL Co.

By

P. S.—The White Ash mine is on the C. & E. I. and Missouri Pacific; Paradise is on the Illinois Central; Freeman is on the Illinois Central and C. B. & Q. We expect to give you 40,000 tons from White Ash, 50,000 tons from Paradise, and 60,000 tons from Freeman. But, as above stated, we reserve the rights to shift the tonnage and to supply coal from other mines in the same district.

On August 24, 1920, Lieutenant Barr wrote plaintiff as follows:

"1. Referring to your letter of August 6, 1920, in regard to contract with your company for 150,000 tons of coal to be shipped from Williamson and Perry County, Illinois, at \$6.50 per ton f. o. b. mines, mine weight to govern in settlement.

"2. The above proposition has been accepted, and will expect you to make shipments as soon as necessary arrangements can be made to furnish cars, shipping instructions to be furnished by this office later.

"3. Contract is being drawn up and will be furnished you for signature within the next few days."

On September 27, 1920, Lieutenant Barr wrote plaintiff, enclosing it a copy of the said written contract of September 10, 1920, and saying:

"1. Enclosed is contract for 150,000 tons coal, to be shipped in approximately five months.

"2. The Illinois Central, Missouri Pacific, and the C. B. & Q. Railroad have been instructed to furnish ten cars per day for White Ash mine at Johnston City, the Freeman Coal Company, Freeman, Illinois, and the Paradise mine at Paradise, Ill.

"3. It is requested that the ten cars of coal loaded at Freeman, Illinois, be billed to the quartermaster at Fort Snelling; the ten cars loaded at White Ash mine, Johnston City, Ill., and Paradise, Ill., to be billed to the quartermaster, Fort Sheridan, Ill. Bills of lading will be furnished for both these shipments. This billing to continue until further notice.

IV

Schedule A, forming a part of the said contract, is as follows:

"SCHEDULE A

"1. Contract date, September 10, 1920.

"2. From Quartermaster at General Supply Depot, 1819 W. 39th St., Chicago, Ill., H. Barr, 1st Lieut. Q. M. C., Purchasing and Contracting Officer.

36 "3. To—Name, Wickham & Burton Coal Co.; address, McCormick Building, Chicago, Ill.; mines at White Ash, Freeman, and Paradise, Ill.

"4. Deliver the following articles, coal, bituminous, mine run.

"5. Total quantity, 150,000 tons.

"6. Unit price, \$6.75 per ton of 2,000 tons [pounds].

"7. Total price, \$1,012,500.00.

"8. F. O. F. delivery point, 40,000 tons, White Ash, Ill., C. & E. I. R. R.; 50,000 tons, Paradise, Ill., Ill. Central R. R.; 60,000 tons, Freeman, Ill., Ill. Cent. & C. B. & Q. R. R.

"9. Schedule of deliveries, approximately 1,600 tons per week from White Ash, Ill.; approximately 2,000 tons per week from Paradise, Ill.; approximately 2,500 tons per week from Freeman, Ill.

"10. Shipping directions to be issued by the Depot Quartermaster, 1819 W. 39th St., Chicago, Ill.

"11. Authorization No., approved prior to signature, QM PJ 212001 PM 2006 September 9, 1920, A. S. Morgan, Colonel, Finance Department, Zone Finance Officer. GM.

"12. Contract No. GP-986-GS.

"13. Item No. of Appropriation 1205 104 G. A. Q. M. C. F. Y. 1921.

"14. Bond, \$105,000.00.

"15. Terms and specification: Strict construction of time periods in contracts—the Secretary of War has directed that special attention of all contractors at the time of signing contracts, be called to the fact that it is the purpose of the War Department to exact a fulfillment of all contracts as to the time periods, and that they should understand when entering into contracts with this department

that they need not do so with the expectation that they can be relieved from these conditions.

"It is provided that the Government may purchase coal other than herein contracted for, for test purposes, it being understood that the total of such coal so purchased for test purposes shall not exceed ten per cent of the total consumption estimated for during the term of this contract.

"Demurrage accruing on coal, not rejected, accumulated at destination through the failure of the carrier to make deliveries to conform with the rate of shipments as directed by the supply officer on account of the inability of the receiving officer to unload same promptly at destination shall not be charged against the contractor.

"If, during the term of the contract, the troops or garrison be withdrawn, in whole or in part, from the post or station, or other radical change in the service, by which the coal will not be required, the contract will be modified accordingly.

"During any period within which the contractor is unable to furnish coal from the mine or mines named herein in sufficient quantities to meet the needs of the Government, or in any quantity, because of strikes, interruption to transportation, shortage of railroad or water transportation equipment, or any other condition general in its nature for which the contractor is in no way responsible, the contractor shall not be held responsible for failure to furnish said coal, but in such case the contractor shall have the right to furnish coal from any other mine or mines producing coal acceptable to the Government under the contract. In case of said failure, or inability

to furnish other coal, the Government shall have the right to procure any additional coal that may be required, and at no

cost to the contractor, until it has been determined by the Government that the contractor is again able to furnish coal in amount as required. It must be understood, however, that the contractor will be relieved of the responsibility of furnishing coal under the contract ONLY during the continuance of suspension of operation, from the said causes, at the mine or mines named in this bid, that he may not be relieved from furnishing any of the coal required under that contract for any of the foregoing causes or conditions, unless he shall have given the Government immediate notice, by wire, of the suspension of operations from causes beyond his control which prevent his furnishing coal in accordance with orders received under this contract. In all cases of disagreement between contractor and the purchase division, the matter in controversy shall be referred to the Secretary of War, whose decision shall be final and binding on both parties to the contract.

"On each day when a shipment is made, notice of the shipment must be supplied promptly to the supply officer located at the Army post, camp, or station to which the coal is consigned, giving the following information:

- "a. Date of shipment.
- "b. Name of mine.

"c. Car initial and number.
"d. Type of equipment, i. e., hopper, flat bottom, gondola, or box car.

"e. Railroad weight of contents of car, or marked capacity of car.
Also a weekly report showing above information must be mailed under sealed cover, postage prepaid, to the Depot Quartermaster, Purchase Division, 1819 W. 39th St., Chicago, Ill. The weekly report must be mailed whether shipments have been made or not. Failure to furnish promptly such notice of shipments and the weekly report will result in delay in passing vouchers for payment.

All coal shipped under these specifications must be reasonably clean and practically free of slate, dirt, and other impurities, and be what is generally accepted as a standard commercial grade of coal for the district from which shipped.

The authorized receiving officer shall, upon the arrival of the coal at the Army post, camp, or station, inspect the same, and if such inspection indicates that the coal is of inferior quality, or has not received careful and thorough preparation, same may be rejected, and the Government shall not be responsible for any acceptance by the authorized receiving officer, and the contractor shall be immediately notified by wire and be required to remove the coal, without cost to the Government. Should the contractor not remove the rejected coal promptly, the Government reserves the right to have the coal removed, and charge any and all costs incidental to such removal against the contractor and his sureties, or deduct the cost thereof from any moneys due or thereafter to become due to the contractor.

Provisions of this contract depend upon the Government furnishing cars at mines indicated above. Bills in triplicate, quoting Wickham & Burton Coal Co. contract No. GP-986-GS, dated September 10, 1920, QM PJ 212001 PM 2006, certified to by the vendor

as to correctness to be rendered to the Finance Officer, U. S. 38 Army, 1819 W. 39th St., Chicago, Ill., whose disbursing officer is designated to make payments on vouchers due under contract."

The said bond of \$105,000 required by the foregoing Schedule A of the contract was furnished by the plaintiff.

Between the time of the plaintiff's proposal of August 6th specifying the price of \$6.50 per ton, and the execution of the written contract on September 10th, there was an increase of 25 cents per ton allowed in the price of coal on account of increase in miners' wages, which increased the contract price to the \$6.75 per ton stated in the contract.

V

The general provisions of the said contract contained, among others, the following provisions:

SECTION 2. Termination in public interest: If, in the opinion of the Quartermaster General, the public interest shall so require, this

contract may be terminated by the United States by 15 days' notice in writing from the contracting officer to the contractor, and such termination shall be deemed to be effective upon the expiration of 15 days after the giving of such notice, and shall be without prejudice to any claims which the United States may have against the contractor under this contract. After the receipt of such notice the contractor shall not order any further materials or facilities, or enter into any further subcontracts, or make any further purchases in connection with the performance of this contract, without written consent previously obtained from the contracting officer, but inspection of the completed articles or work and acceptance thereof by the United States in accordance with the terms of this contract shall continue during such period of 15 days as though such notice had not been given.

"In the event of and upon such termination of this contract prior to completion, as provided in this section 2, for any reason other than the default of the contractor, the United States shall make payments to and protect the contractor as follows:

"(a) The United States shall pay to the contractor the contract price or compensation, not previously paid, for all articles or work completely manufactured or completely performed in accordance with the requirements of this contract at the date such termination becomes effective.

"(b) The United States shall reimburse the contractor for such proportion of the contractor's expenditures (other than expenditures for plant, facilities, and equipment solely provided for the performance of this contract) made by the contractor in good faith in connection with the performance of this contract, as is fairly and properly apportionable to the articles or work the delivery or performance of which is so terminated, plus 10 per cent of the amount so ascertained. Any raw materials, articles in process of manufacture, and other property so paid for shall become the property of the United States.

"(c) The United States shall protect the contractor against such proportion of the contractor's outstanding obligations, incurred by the contractor in good faith in connection with the performance of this contract, as is properly and fairly apportionable to the articles or work, the delivery or performance of which is so terminated.

39 "The facts to be determined under the above subdivisions

(b) and (c) shall be determined by agreement between the contractor and the contracting officer, and in event of their failure to agree shall be determined by three persons, one to be appointed by the contractor, one by the contracting officer, and the third by these two.

* * * * *

"In the event of the termination of this contract under this section 2, any and all obligations of the United States to make any payments to the contractor under this contract, other than those specified

or provided for in this section 2, and in the article hereof, entitled 'Patent infringements,' shall at once cease and determine.

"17. Adjustment of claims and disputes: Except as otherwise specifically provided in this contract, any claims, doubts, or disputes which may arise under this contract, or as to its performance or non-performance, and which are not disposed of by mutual agreement, may be determined, upon petition of the contractor, by the Secretary of War or his duly authorized representative or representatives. If the Secretary of War selects a board as his authorized representative to hear and determine any such claims, doubts, or disputes, the decision of the majority of said board shall be deemed to be the decision of the board. The decision of the Secretary of War or of such duly authorized representative or representatives shall be final and conclusive on all matters submitted for determination: Provided, That where the decision is rendered by such representative or representatives, the Secretary of War may, at his option, either upon his own motion or upon petition filed with him by the contractor within 20 days after notice of the decision of such duly authorized representative or representatives has been served upon him, review the action of such representative or representatives and render his decision thereon. Any sum or sums allowed to the contractor under the provisions of this article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

"22. Waiver: No provision of this contract shall be deemed waived without express consent in writing signed by the party charged with the waiver.

"24. Appropriations: This contract shall be noneffective until an appropriation adequate to its fulfillment is granted by Congress and is available, except in so far as is necessary to provide for the necessities of the service as authorized by section 3732 of the Revised Statutes of the United States. However, in order to provide for the necessities of the service as authorized by said section 3732, the articles so far authorized by said section shall be furnished and delivered at times and in the manner required under this contract, and payments therefor shall be made as soon as practicable after funds are appropriated and are available."

VI

At the time of the execution of the said contract and during the period for its performance the plaintiff company was engaged solely as a selling company, and was not the owner or operator of any coal mine or mines, nor the owner of any stock or interest in either 40 of the three coal companies owning or operating the mines mentioned in said Schedule A of the contract, as the mines from which the coal contracted for by the Government was to be furnished by plaintiff.

During the times aforesaid the president of plaintiff company, the said Fred A. Burton, was also president and principal owner of the Johnston City Washed Coal Company, which owned and operated the said White Ash mine referred to in said Schedule A, and by which a large part of the coal delivered to the Government under the contract in suit was furnished to plaintiff; and some time during the year 1923, the said White Ash mine was purchased by plaintiff company.

VII

The said Freeman, Paradise, and White Ash mines, operated by the Freeman Coal Mining Company, the Paradise Coal Company, and said Johnson City Washed Coal Company, respectively, were located in Perry and Williamson Counties, in southern Illinois. Plaintiff had selling contracts with said companies, under which it sold coal to purchasers under contracts between plaintiff, in its own name, and such purchasers.

Plaintiff, under its contracts with the companies operating the said White Ash and Paradise mines, financed the operations of said mines by advancing the necessary funds for meeting their pay rolls bimonthly, which was the general custom and practice of selling companies at that time, with reference to operating companies whose output was sold by them. The Freeman mine was similarly financed by another selling company, by which its output was largely sold.

VIII

The said mines specified in the contract in suit, and the mines generally in Illinois, have no coal storage facilities; and the general practice or custom is not to mine the coal until orders for sales are received, and to load the coal directly on the cars as mined. This course was followed in the mining and delivery to the Government of the coal delivered by plaintiff under its said contract with the Government.

IX

Both prior to and following the execution of the written contract of September 10, 1920, the plaintiff proceeded with shipments of coal to various points in accordance with shipping instructions received from the proper Government officers.

On November 22, 1920, Major Norris Stayton, purchase officer, depot quartermaster's office at Chicago, who was the immediate superior of Lieutenant Barr, the contracting officer under the contract, wrote plaintiff as follows:

"Reference contract No. 986 for 150,000 tons coal, do not exceed delivery of 33,000 tons for Fort Sheridan, Ill.

"By authority of the depot quartermaster."

On December 6, following, Major Stayton wrote plaintiff as follows:

"With reference to contract 986-GS, for 150,000 tons coal, this will confirm phone conversation to the effect that at the present time, there
is no place where any of this undelivered portion can be
41 shipped. It is hoped, however, that the remainder of this con-
tract may be shipped prior to the expiration date.

"By authority of the depot quartermaster."

On January 12, 1921, Major Stayton wrote plaintiff:

"As per telephone conversation of this date it is requested that all shipments of coal to quartermaster, Fort Des Moines, Des Moines, Iowa, be discontinued until further notice from this office.

"By authority of the depot quartermaster."

On February 5, following, Major Stayton wrote plaintiff:

"As per telephone conversation with your Mr. MacDonald, under date of February 2nd, it is requested that you forward this office immediately upon receipt of this letter records showing quantity of coal delivered on your contract, in order to check same with records of this office.

"By authority of the depot quartermaster."

On February 9 plaintiff, in reply to the above letter, wrote Major Stayton as follows:

"Relying to your letter of February 5th, your file 400319 Pur-
GS, wish to advise that our records show that 50,000 tons of coal have been delivered under our contract, leaving a balance still un-
shipped of 100,000 tons, on which we are awaiting shipping instruc-
tions."

On the same date, February 9, 1921, Major Stayton wrote plaintiff with reference to said contract:

"It is requested that all shipments of coal on above contract be stopped until further notice from this office.

"By authority of the depot quartermaster."

On February 14, 1921, Major Stayton wrote the plaintiff a letter in which he said, among other things, that "the necessity for emergency coal shipments having passed, it is requested that you return to this office, with the least practicable delay, all unused Government bills of lading furnished you for the purpose of making shipments on Government orders."

On February 15, 1921, the plaintiff replied to the above letter and returned to Major Stayton all unused Government bills of lading.

Following the above correspondence, on March 9, 1921, under direction of Major Stayton, his chief of division, Captain C. A. Radcliffe, who had succeeded Lieutenant Barr in the Chicago office, wrote plaintiff as follows with reference to said contract:

"There is inclosed herewith letter of cancellation covering the undelivered coal (approximately 96,435 tons) on the above-men-
tioned contract.

"It is requested that receipt of this cancellation be acknowledged.

"By authority of the quartermaster supply office."

The "letter of cancellation" inclosed with the above letter to plaintiff was as follows:

"OFFICE QUARTERMASTER SUPPLY OFFICE, CHICAGO,
"GENERAL INTERMEDIATE DEPOT, U. S. ARMY,
"1819 W. 39th St., Chicago, Ills., March 7, 1921.

"LETTER OF CANCELLATION

"Due to the limited appropriation available for purchase of coal and to the fact that no further calls will be made for delivery on contract GP-986-GS, dated September 10, 1920, with Wickham & Burton Coal Company, Chicago, Ills., the undelivered portion (approximately 96,435 tons) of bituminous mine-run coal at \$6.75 per ton is hereby canceled.

"C. A. RADCLIFFE,
"Captain, Q. M. C."

Both during and subsequent to the foregoing correspondence plaintiff was verbally informed, through conferences between its officers and the Government officers having charge of the performance of the contract, that the Government was not then able, and probably would not be able, to take the remainder of the 150,000 tons of coal specified in the contract, and especially because of lack of storage facilities.

The procedure of the Government officers in the cancellation of said contract was the usual procedure followed by the Chicago division of the Quartermaster General's office.

It does not appear that either the Quartermaster General or the Acting Quartermaster General ever rendered or expressed an opinion, wrote any communication, or made any statement to the contracting officer at Chicago, that the public interest required said contract to be terminated; nor does it appear that they ever had the cancellation of the contract under consideration, or had any correspondence with Major Stayton between November 1, 1920, and March 9, 1921, with reference to cancelling it. Nor does it appear that the General Staff of the Army sent out general directions for the cancellation of such contracts.

X

The reasons for the Government's cancellation of the said contract were as follows:

A reduction in the quantity of coal needed, on account of mild winter weather, and probable overestimates by post quartermasters of their needs, with a resulting accumulation of coal, and lack of storage facilities necessary to store the coal, so as to prevent its deterioration; and also a desire to apply to other needs of the service such of the available appropriation as was not needed for the purchase of necessary coal, before the appropriation lapsed by expiration of the time limit for its use.

These reasons were not communicated to the plaintiff otherwise than as appears from the correspondence and facts set forth in Finding IX.

XI

The plaintiff was ready, able, and willing to furnish and deliver to the Government, in accordance with the terms of its said contract, the full 150,000 tons of coal specified in the contract; and when stopped by the Government, as shown by Finding IX, plaintiff, through its said officers, repeatedly requested of the proper Government officials shipping instructions for the remaining or undelivered portion of the said 150,000 tons; but no shipping instructions were thereafter given plaintiff.

XII

Of the 150,000 tons of coal specified in the contract there were allocated to the White Ash mine 40,000 tons; to the Paradise mine, 50,000 tons; and to the Freeman mine, 60,000 tons.

Under the shipping orders or instructions received by plaintiff from the Government, plaintiff furnished and delivered to the Government a total of 53,146 tons of coal, for all of which it was paid the contract price of \$6.75 per ton. Of this total quantity delivered 22,473 tons were furnished from the White Ash mine, 21,193 tons from the Paradise mine, and 9,480 tons from the Freeman mine; which left undelivered, of the quantities allocated by the contract to the said mines, 17,527 tons for the White Ash mine, 28,807 tons for the Paradise mine, and 50,520 tons for the Freeman mine, a total of 96,854 tons undelivered.

The Government was unable to provide cars in time for the shipments of said coal, and cars were furnished by plaintiff or by the said mines from the cars allotted them for regular commercial shipments.

XIII

The Emmons Coal Company of Philadelphia, Pa., during the period between September, 1920, and March 7, 1921, was supplying coal to the Government in the Chicago District. It was given a semiofficial position and designated by the Quartermaster General's Office as the purchasing agent of the Quartermaster General to obtain and furnish coal for posts in the entire United States. This arrangement or authorization by the Government was made subsequent to September 10, 1920, and said Emmons Coal Company supplied to Camp Grant, Illinois, and Jefferson Barracks, St. Louis, Mo., a total of 170,626 tons prior to March 9, 1921, at a price of \$5.50 per ton.

Camp Grant and Jefferson Barracks were two of the largest posts in the Chicago District.

XIV

On August 6, 1920, plaintiff, upon and pursuant to its said agreement with Lieutenant Colonel Barney and Lieutenant Barr as to the terms of the said contract executed on September 10 following, entered into an agreement with the said Freeman Coal Mining Company, operators of the Freeman mine, reading as follows:

"The undersigned, Wickham & Burton Coal Co. and Freeman Coal Mining Company, have made a proposition to the United States Government for the sale of coal as per Exhibit A attached and made a part hereof.

"If the proposition is accepted, then the Freeman Coal Mining Co. is to furnish 60,000 tons.

"The coal furnished by Freeman Coal Mining Company will be billed to Wickham & Burton Coal Co. by D. E. McMillan & Bro., but Wickham & Burton shall be liable only as hereinafter provided. They do not become the debtor of D. E. McMillan & Bro. or of Freeman Coal Mining Company for the coal furnished by or for the latter.

"Wickham & Burton Coal Co. will bill all coal to the Government and will make all collections. All deductions made by the Government on coal furnished by or for Freeman Coal Mining Company will be charged to that company. The money collected by Wickham & Burton Coal Co. on account of coal delivered by or for Freeman Coal Mining Company shall belong to said Freeman Coal Mining Company and will be paid to it immediately on receipt.

44 "In case the Government pays on account for only a part of the total amount due, then the payment shall belong to the parties in proportion to the amounts owing to them severally.

"If Wickham & Burton Coal Co. fail to promptly pay over money collected by them from the Government for Freeman Coal Mining Company, then latter may suspend shipments and be entitled to recover from Wickham & Burton Coal Co. damages sustained.

"But Wickham & Burton Coal Co. shall be liable to Freeman Coal Mining Company for moneys actually received by them from the Government on account of coal shipped by or for Freeman Coal Mining Company, as well also for any damages sustained by Freeman Coal Mining Company by nonpayment and consequent nonshipment by Freeman Coal Mining Company.

"Inasmuch as the proposed sale to the Government is to be made by Wickham & Burton Coal Co., who will be liable to the Government for breach of contract, Freeman Coal Mining Company will be liable to Wickham & Burton Coal Co. for damages resulting from Freeman Coal Mining Company's failure to perform as though Wickham & Burton Coal Co. were purchasing from Freeman Coal Mining Company.

"It is understood that McElvain-Hoy Coal Co. may deliver hereunder for Freeman Coal Mining Company coal from White Ash mine sold by Wickham & Burton Coal Co. to McElvain-Hoy Coal

Co. Also that they may deliver coal from Ward mine in Jackson County, if the latter be acceptable to the Government.

"The matter of commissions to be paid by Freeman Coal Mining Company on account of this business has not been adjusted. It is referred to Frank Crozier, whose decision shall be binding. To him also is referred any question which may arise between the parties as to the interpretation of this agreement or the carrying out of the contract and his decision shall be binding."

The proposition referred to in the first paragraph of this contract, and attached thereto as Exhibit A, was the plaintiff's said letter of August 6, 1920, set forth in Finding III.

XV

Under plaintiff's agreement with the companies operating the said White Ash, Paradise, and Freeman mines, plaintiff's profits on the coal to be sold and delivered by it to the Government from said mines under its said contract of September 10, 1920, were to be as follows:

On coal from the White Ash mine, 10 per cent of the selling price, or 67½ cents per ton; on coal from the Paradise mine, 75 cents per ton; and on coal from the Freeman mine, 25 cents per ton.

Plaintiff, by agreement with said companies, had the privilege, in case of a car shortage or other emergency, of decreasing the quantity of the coal to be furnished by either of said companies.

XVI

Beginning about the 1st of December, 1920, the market price of coal began to decline, and gradually declined until during the period from February 9 to March 9, 1921, the market price of mine-run bituminous coal at said White Ash, Paradise, and Freeman 45 mines was \$2.15 per ton. It does not appear what was its market value during the months of December, 1920, and January, 1921.

XVII

The difference between the contract price of \$6.75 per ton for the said 96,854 tons of coal not ordered by or delivered to the Government under the plaintiff's said contract, and its market value at the said White Ash, Paradise, and Freeman mines during the period from February 9 to March 9, 1921, was \$4.60 per ton, or a total of \$445,528.40.

XVIII

The difference between the contract price of said 96,854 tons of coal and the cost of its production by the said mining companies was \$4.34 per ton, or a total of \$420,346.36.

XIX

The profits that would have been realized by plaintiff upon the said 96,854 tons of coal if it had been ordered and taken by the Government under said contract, and had been furnished from the said White Ash, Paradise, and Freeman mines in accordance with the said allotments to said mines, would have amounted to the sum of \$46,065.97.

Conclusion of law

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of \$445,528.40 on Finding XVII. It is therefore adjudged and ordered that the plaintiff have and recover of and from the United States the sum of four hundred and forty-five thousand five hundred and twenty-eight dollars and forty cents (\$445,528.40).

Opinion

BOOTH, Judge, delivered the opinion of the court:

This case is now before the court for final disposition. On March 31, 1924, we dismissed the petition. Subsequently a motion for a new trial was filed, new trial was allowed, and the case reargued. A considerable portion of the delay in the final consideration of the case is justly attributable to the undue prolixity of plaintiff's brief and argument on the last trial. To challenge findings indisputably accurate and indulge in endless citations of a cumulative character involves tedious prolongation and delay.

The plaintiff, a corporation organized under the laws of Illinois, entered into a written contract on September 10, 1920, to supply the defendant with 150,000 tons of coal. The price therefor was fixed at \$6.75 per ton f. o. b. cars at certain designated coal mines in southern Illinois. The contract was an emergency one.

The Quartermaster General of the Army had experienced difficulty in obtaining coal at a fair price, and really persuaded the plaintiff to make the agreement. Without going into the minute details of the transaction, carefully set forth in the findings, we deem it sufficient to say that on March 7, 1921, the defendant undertook to

46 cancel the contract. On this date a letter signed by "C. A. Radcliffe, Captain, Q. M. C." was addressed to the plaintiff, notifying it to this effect. The plaintiff up to and including this date had delivered to the defendant in accord with the terms of the contract 53,146 tons of coal, leaving an undelivered balance of 96,854 tons. The suit is to recover the difference between the contract price of this 96,854 tons of coal, neither ordered nor delivered under the contract, and the market value of the same on the date and at the place of delivery fixed in the contract, a sum totaling \$445,528.40.

The right of recovery is obviously predicated upon this cancellation clause of the contract. If the defendant possessed in virtue of the terms of the cancellation clause of the contract the legal right to terminate it for the reason therein stated, and followed the method therein prescribed, the plaintiff would be without legal cause of complaint. The cancellation clause is in many respects wholly inapplicable to the subject matter of the contract and the terms and conditions therein stipulated. It is, however, a part of the agreement signed by the parties and sufficiently precise to give to the defendant the right of cancellation as therein provided. Section 2 of the general provisions of the contract is set out in detail in Finding V.

The vital issue with respect to this clause is the contention of the plaintiff, first, that it was not observed as to prescribed method; second, that the notice was too late, the contract period for the delivery of the coal having expired, and that defendant, not plaintiff, was in default; and, finally, that the real reason was the obtaining of coal from another contractor at a less price per ton, delivered at certain of the places plaintiff was obligated to supply, and not the public interest which actuated the proceedings.

The right of cancellation, or to the same effect, termination, was not an arbitrary one. The stipulation respecting it required the independent opinion of the Quartermaster General as to the public interest, and 15 days' notice of intent to exercise the right. These two important factors, deemed essentially important to the contractor as well as the defendant, were not senseless provisions, capable of being ignored when the forfeiture of important property rights under a contract were involved. It was necessary for the defendant to observe strictly the provisions of the clause. It was inserted in the contract by the defendant, worked in the end to confer an important privilege on the defendant, was easy of precise observance, and failure to comply therewith has been held fatal to the right.

In Williams v. United States, 26 C. Cls., 132-141, this court followed the fundamental rule that "the agreement having provided a specific mode in which the contract was to be annulled, that mode must be strictly pursued in order to charge the claimant with the consequences of delinquency." In the case of Stone, Sand & Gravel Co. v. United States, 234 U. S. 270, the Supreme Court said: "The benefit and burden of a provision in a Government contract giving a right to annul in consequence of a breach by failure to commence work must hang together and the Government can not avail of the former without accepting the latter." In Hawkins v. United States, 96 U. S. 689, the contract provided that no departure should be made from its conditions without the written consent of the Secretary of the Treasury. The contractor in this case complied with 47 the terms of the contract, but an officer, other than the Secretary, required of him material different from that specified, to which change the contractor assented. The Supreme Court declined

to grant additional compensation, holding that the contractor was obligated to take notice that no one other than the Secretary might vary the terms of the contract. Another case, similar in principle, decided by this court, held: "Where a contract is in terms subject to the approval of two designated superior officers, none below them have a right to change the terms of the agreement." *Mitchell v. United States*, 19 C. Cls. 39. In *King v. United States*, 37 C. Cls. 428, 436, Chief Justice NOTT in delivering the opinion of the court, said: "As forfeitures are not favored in law, and as parties who seek to assert a forfeiture are generally held to the very letter of their authority, it may be doubted whether in an action between two persons this notice would be upheld by a court. The contract called for 'the judgment of the engineer in charge,' and gave him alone 'power, with the sanction of the Chief of Engineers, to annul the contract by giving notice in writing to the party of the second part.' The Chief of Engineers and the Secretary of War and the assistant who signed the notice were not the persons named in the contract. The contractor was entitled to the judgment of the engineer in charge, with the sanction of the Chief of Engineers, and was entitled to 'notice in writing to that effect from the engineer in charge.'"

It is true that the above case was determined upon a proven breach of the contract by the United States, and the quoted observations were not vital to the judgment awarded; nevertheless, it is a cogent résumé of the law respecting the subject and worthy of citation. The case of *Spencer v. Duplan Silk Co.*, 112 Fed. 638, approves the principle, and a long and uniform line of State cases are in strict harmony on the subject. *Page on contracts*, vol. 3, sec. 1464, p. 2260, contains a comment on the delegation of authority reposed by the terms of a contract in a named individual, and therein it is stated that without the assent of the contractor it may not be done. The Supreme Court has on more than one occasion affirmed the doctrine that where a Government contract in terms provides that it shall not become effective until approved by an officer named therein, such approval by said officer must affirmatively appear before it becomes a binding obligation. *Filor v. United States*, 9 Wall. 45; *United States v. Lynah*, 188 U. S. 445; *United States v. Mitchell*, 163 U. S. 253.

The cancellation clause involved herein expressly gave to the plaintiff the right to have the opinion of the Quartermaster General, and conferred upon this officer a discretion, after a review of the situation, to either cancel or withhold cancellation of the contract. The contracting officer was to give 15 days' notice, a mere ministerial act, thus emphasizing the mutual understanding of the parties that one designated official was to act in a judicial capacity and the other carry forward his determination. We need not multiply citations to the effect that where one is vested with discretion to do or not to do a certain thing, he alone must act. - The record in this case discloses the importance of this contractual right to the plaintiff. Not only was the plaintiff not in default in the performance of the con-

tract—in fact more had been done than the agreement called
48 for—but there is abundant room for holding that the reasons given were not in strict accord with the facts. Coal was being delivered to stations under another contract which this contractor was to supply. There is no evidence of a lack of appropriation and nothing whatever to show that the step taken was such as the public interest required. As a matter of fact, it is fairly inferable that the motive for cancellation was the ability to obtain coal to meet the demands of the defendant at a less price per ton, and the desire of Major Stayton to utilize the available appropriation for other purposes. The defendant asserts the procedure followed in the cancellation is similar to the one usually employed under like circumstances by the Government. The argument is not impressive. The plaintiff did not assent to the proceedings, or in any manner waive its rights under the contract, as provided in section 22 thereof.

On the previous hearing of the case we were of the opinion that the plaintiff had failed to sustain proof of loss and so believing, dismissed the petition. This opinion was predicated upon the contracts between the plaintiff and the mining companies who were to furnish the coal. In this respect we believe we were in error. The contract sued upon is the contract between the parties to this suit, and rights are to be determined according to its terms. The transaction was in effect a sale, and the rule of damages is well settled. The contract was between the plaintiff and defendant. The contract fixed the rights of the parties, and to its terms and provisions we alone must resort. The plaintiff entered into a bond for its faithful performance, and would have been liable thereon in case of default. What contracts the plaintiff had with third parties, and rights and liabilities growing out of the same, to which the defendant was not a party and in no way concerned, are not available to curtail or defeat liability under a contract legally existing between the parties to this litigation.

The defendant agreed to purchase the coal and pay a stipulated price therefor. If the coal was not needed, or the public interests required a cancellation of the contract, a method was expressly pointed out in the contract itself by which the desired result could have been brought about without resulting in loss or injury. This method was not followed. The defendant is charged with the observance of contractual stipulations to the same extent as the plaintiff.

There are many questions raised in the briefs of counsel. If we are correct, they are all subordinate to the right of cancellation of the contract. The contract, in our opinion, was not cancelled according to its terms, and what was done in no way relieves the defendant from its breach.

Judgment will be awarded the plaintiff under Finding XVII for \$445,528.40. We may not, under the law, allow interest.

It is so ordered.

Hay, Judge; Downey, Judge; and Campbell, Chief Justice, concur.

VI. Judgment

At a Court of Claims held in the city of Washington on the 2nd day of February, A. D. 1925, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of four hundred and forty-five thousand five hundred and twenty-eight dollars and forty cents (\$445,528.40).

By the COURT.

VII. Proceedings after judgment

On March 28, 1925, the defendant filed a motion to amend the court's findings and to add to findings.

On April 4, 1925, the plaintiff filed an opposition to the defendant's motion and filed a countermotion to amend and add substitute findings of fact.

VIII. Order orruling motions to amend findings, April 6, 1925

It is ordered by the court this 6th day of April, 1925, that the plaintiff's and the defendant's motions to amend findings be and they severally are overruled.

IX. Petition for appeal

Filed April 14, 1925

From the judgment rendered in the above-entitled cause on the 2nd day of February, 1925, in favor of claimant, the defendants, by their Attorney General, on the 14th day of April, 1925, make application for, and give notice of, an appeal to the Supreme Court of the United States.

HERMAN J. GALLOWAY,
Assistant Attorney General.

X. Order allowing appeal

It is ordered by the court this 20th day of April, 1925, that the defendant's application for appeal be and the same is allowed.
51 [Clerk's certificate to foregoing transcript omitted in printing.]

(Indorsement on cover:) File No. 31,125. Court of Claims. Term No. 100. The United States, appellant, vs. Burton Coal Company. Filed May 6th, 1925. File No. 31,125.

